

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
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10 IN RE VALVE ANTITRUST LITIGATION
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13 NO. 2:21-CV-00563-JCC
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INTERVENORS JASON BROOKS AND
ROBERT AUSTIN MCCUISTION'S
MOTION TO INTERVENE

NOTED FOR CONSIDERATION:
APRIL 19, 2024

I. INTRODUCTION

Jason Brooks and Robert Austin McCuistion (Proposed Intervenors) are gamers—they regularly buy video game content through defendant Valve's Steam platform. Proposed Intervenors should be granted permissive leave to intervene for the limited purpose of opposing sealing under Rule 24(b)(2). Proposed Intervenors have First Amendment and common law rights of access to court records and an interest in the documents cited in Plaintiff's Motion for Class Certification (Dkt. No. 203) (the "Class Certification Motion") given that they are consumers who have purchased games on Steam and whose potential claims challenging Valve's anticompetitive commissions were compelled to arbitration by this Court. Proposed Intervenors submit their opposition to Defendants' Motion to Seal (Dkt. No. 198), in lieu of any pleading. *See Fed. R. Civ. P. 24(c).*

II. STATEMENT OF FACTS

The named plaintiffs in this action have moved to certify a class that includes game developers who paid commissions to Defendants in connection with sale of a game on the

1 Steam platform where the game was purchased by consumers based in the United States. Dkt.
 2 No. 203. Proposed Intervenors have indirectly paid those commissions through increased prices
 3 of games they bought on the Steam platform. Proposed Intervenors have First Amendment and
 4 common law rights of access to court records.

5 Plaintiffs' Class Certification Motion filed in open Court is heavily redacted and
 6 Defendants seek to keep the unredacted version of the brief under seal. *See* Dkt. No. 203
 7 (redactions on 20 pages of 30-page brief). In addition, Defendants seek to seal or heavily redact
 8 67 exhibits filed in connection with class certification. *See* Dkt. No. 198 at 2. Responses to the
 9 motion to seal are due on the same date this motion is being filed. *See* Dkt. No. 198 (noted for
 10 consideration on April 5, 2024).

11 III. ARGUMENT

12 "Nonparties seeking access to a judicial record in a civil case may do so by seeking
 13 permissive intervention under Rule 24(b)(2)." *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187
 14 F.3d 1096, 1100 (9th Cir. 1999); *see* Fed. R. Civ. P. 24. Ordinarily, a court may grant permissive
 15 intervention if the movant presents "(1) an independent ground for jurisdiction; (2) a timely
 16 motion; and (3) a common question of law and fact between the movant's claim or defense and
 17 the main action." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992).
 18 Consistent with the requirements of Rule 24(b), the court must also "consider whether the
 19 intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed.
 20 R. Civ. P. 24(b)(3). Because Proposed Intervenors seek to intervene only for the limited purpose
 21 of opposing sealing court records, Proposed Intervenors need not "demonstrate independent
 22 jurisdiction or a common question of law or fact," only that their motion is timely. *Cosgrove v.*
 23 *Nat'l Fire & Marine Ins. Co.*, 770 F. App'x 793, 795 (9th Cir. 2019) (citing Beckman, 966 F.2d at
 24 473); *see Greer v. Cty. of San Diego*, No. 19CV378-JO-DEB, 2023 WL 4479234, at *3 (S.D. Cal.
 25 July 10, 2023) ("a party who seeks to intervene solely to unseal filed documents only needs to
 26 show timeliness"); *see also* LCR 5(g)(8) ("[a] non-party seeking access to a sealed document may
 27 intervene in a case for the purpose of filing a motion to unseal the document.").

1 In determining whether the motion is timely, a court must consider “(1) the stage of the
 2 proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3)
 3 the reason for and length of the delay.” *San Jose Mercury News*, 187 F.3d at 1101. Proposed
 4 Intervenors’ motion is timely—it is submitted with an opposition to a sealing request on the
 5 date such oppositions are due. See *id.* (citing cases to demonstrate that “delays measured in
 6 years have been tolerated where an intervenor is pressing the public’s right of access to judicial
 7 records”).

8 Allowing Proposed Intervenors to intervene for the limited purpose of opposing sealing
 9 will not prejudice the parties. Even if it did, once an intervenor asserts “a legitimate,
 10 presumptive right to open the court record . . . , the potential burden or inequity to the parties
 11 should affect not the right to intervene but, rather, the court’s evaluation of the merits of the
 12 applicant’s motion.” *San Jose Mercury News*, 187 F.3d at 1101 (quoting *Public Citizen v. Liggett*
 13 *Grp., Inc.*, 858 F.2d 775, 787 (1st Cir. 1988)). Furthermore, the degree of secrecy involved in
 14 these proceedings may infringe on the public’s presumptive right of access to any hearing on
 15 the motion for class certification and ability to understand the reasoning contained in an order
 16 granting or denying class certification—allowing the overbroad sealing requested would require
 17 the Court to either provide only a cursory discussion of the evidentiary record at class
 18 certification or heavily redact its class certification order.

19 Finally, allowing Proposed Intervenors to intervene will not unduly delay or prejudice
 20 the adjudication of the original parties’ rights. See Fed. R. Civ. P. 24(b)(3). As explained in
 21 Proposed Intervenors’ opposition to pending sealing motions, Defendants have an existing
 22 burden to establish that there are compelling reasons for keeping these court records sealed.
 23 “The mere fact that Defendants will need to explain why the relevant records should [be]
 24 sealed is not, itself, unduly prejudicial.” *Muhaymin v. City of Phoenix*, No. CV-17-04565-PHX-
 25 DLR, 2021 WL 5173767, at *1 (D. Ariz. Nov. 3, 2021).

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1 Proposed Intervenors' motion to intervene for the limited purpose of opposing
2 Defendants' request to seal both briefing and exhibits on class certification is timely and should
3 be granted under Rule 24(b)(2).

4 **IV. CONCLUSION**

5 Because Proposed Intervenors satisfy the requirements for permissive intervention
6 under Rule 24(b), the Court should grant their motion and allow Proposed Intervenors to assert
7 their First Amendment and common law rights of access to court records.

8 RESPECTFULLY SUBMITTED AND DATED this 1st day of April, 2024.

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10 TERRELL MARSHALL LAW GROUP PLLC

11 *I certify that this memorandum contains 964 words,*
12 *in compliance with the Local Civil Rules.*

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